



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF NIEDBAŁA v. POLAND

(Application no. 27915/95)

JUDGMENT

STRASBOURG

4 July 2000

In the case of Niedbała v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,

Mrs W. THOMASSEN,

Mr J. MAKARCZYK,

Mr R. TÜRMESEN,

Mr J. CASADEVALL,

Mr B. ZUPANČIČ,

Mr T. PANTÎRU, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 14 March 2000 and 15 June 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 27915/94) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Maciej Niedbała ("the applicant"), on 5 February 1995. The applicant alleged a violation of Article 5 §§ (3) and (4) and Article 8 of the Convention.

2. Before the Court the applicant was represented by Mr W. Hermeliński, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr Krzysztof Drzewicki, of the Ministry of Foreign Affairs.

3. On 7 July 1999 the panel of the Grand Chamber determined that the case should be decided by one of the Sections (Rule 100 § 1 of the Rules of Court). It was thereupon assigned to the First Section.

4. The applicant and the Government each filed a memorial on the merits (Rule 59 § 1).

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 March 2000.

There appeared before the Court:

(a) for the Government

Mr Krzysztof DRZEWICKI, *Agent*,

Mr Wojciech DZIUBAN, *Counsel*,

Ms Renata KOWALSKA,

Ms Małgorzata WĄSEK-WIADEREK,
Mr Piotr NOWOTNIAK, *Advisers*.

(b) *for the applicant*

Mr Wojciech HERMELIŃSKI, *Counsel*.

The Court heard addresses by Mr Wojciech HERMELIŃSKI, Mr Krzysztof DRZEWICKI, Ms Małgorzata WĄSEK-WIADEREK and Ms RENATA KOWALSKA.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 31 August 1994 the applicant was arrested. On 2 September 1994 the Rybnik District Prosecutor, W., remanded him in custody on suspicion of theft of a car.

7. The applicant appealed to the Katowice Regional Court. On 12 September 1994 the court dismissed the appeal, finding that there was sufficient evidence to establish that the applicant might have committed the offence concerned and the reasons for which the applicant had been remanded in custody had not ceased to exist.

8. On 21 September 1994 the Rybnik District Public Prosecutor prolonged the applicant's detention until 30 November 1994, considering that the evidence gathered in the course of investigations strongly indicated that the applicant had committed the offence in question. An expert opinion had still to be taken.

9. On 10 October 1994 the Katowice Regional Court dismissed the applicant's appeal against this decision, considering that the evidence strongly indicated that the applicant had committed the offence in question. Further time-consuming evidence still had to be taken, which justified the prolongation of the detention.

10. On 24 October 1994 the Rybnik District Public Prosecutor refused to release the applicant, considering that the investigations had not been completed, further forensic evidence had to be taken and the reasons for which the detention had originally been decided had not ceased to exist.

11. On 2 November 1994 the applicant wrote a letter to the Ombudsman, complaining about alleged irregularities in the criminal proceedings against him and about having allegedly been assaulted by the police on his arrest. The prison authorities forwarded this letter to the Rybnik District Prosecutor. On 23 November 1994 the Rybnik District Prosecutor informed

the applicant that the letter to the Ombudsman had been forwarded to the Tychy District Public Prosecutor, for the purpose of investigating the alleged assault. It was later forwarded to the Ombudsman. The letter reached the Ombudsman's office on 27 December 1994 and was registered there under file number RPO 174886/94/II. On 28 November 1994 the applicant sent a further letter to the Ombudsman.

12. On 15 November 1994 the Katowice Regional Prosecutor dismissed the applicant's appeal against the decision of 24 October 1994. The Prosecutor considered that the evidence strongly indicated that the applicant had committed the offence in question. The reasons for which the detention had been ordered had not ceased to exist. The investigations should be continued and this required that the applicant should remain in detention.

13. On 9 March 1995 the applicant filed a request with the Katowice Regional Court to have the lawfulness of his detention reviewed as provided for by Article 5 § 4 of the European Convention of Human Rights. This request remained unanswered.

14. On 20 March 1995 the Katowice Regional Court convicted the applicant of possessing stolen goods and ordered that he be released from detention on remand. The applicant and the Public Prosecutor filed appeals against this judgment.

15. On 21 April 1995 the applicant was rearrested and the Racibórz District Public Prosecutor decided to put the applicant in detention on remand on suspicion of attempted theft of a car on 20 April 1995. The applicant appealed to the Racibórz District Court, invoking, *inter alia*, Article 5 § 3 of the Convention. On 27 April 1995 the court dismissed the appeal, considering that the detention on remand had been ordered in accordance with the law. Article 210 § 1 of the Code of Criminal Procedure provides that it is the Public Prosecutor who is competent to decide on detention on remand.

16. On 12 June 1995, in reply to the applicant's letter of 2 November 1994, the Ombudsman informed the applicant that the ratification of the Convention did not automatically entail the derogation of the provisions of Polish law relating to the authorities competent to decide on deprivation of liberty. Thus the courts and prosecutors were still obliged to apply domestic law currently in force in this respect. The relevant amendments to the Code of Criminal Procedure had already been adopted by Parliament, but they had not yet entered into force. Current public debate about the possible direct applicability of the Convention in the domestic legal order was of a purely theoretical nature. The decisions concerning the applicant's detention were therefore in accordance with the law.

17. On 5 September 1995 the Katowice Court of Appeal amended the impugned judgment of 20 March 1995 in that it found the applicant guilty of aiding and abetting the sale of stolen goods and sentenced him to two years and six months' imprisonment and a fine.

II. RELEVANT DOMESTIC LAW

a. Preventive measures in criminal proceedings

18. At the relevant time, the authorities competent to decide on detention on remand were provided for in Articles 210 and 212 of the Polish Code of Criminal Procedure of 1969, which read as follows:

Article 210:

"1. Preventive measures [i.e. detention on remand, bail and police supervision] shall be imposed by the court; before a bill of indictment is lodged with the court, they shall be ordered by the prosecutor (...)."

Article 212:

"1. A decision concerning preventive measures may be appealed [to a higher court]

2. A prosecutor's order on detention on remand may be appealed to the court competent to deal with the merits of the case...."

19. These provisions were amended on 29 June 1995 by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes, which entered into force on 4 August 1996. Pursuant to this amendment, detention on remand could be imposed only by a court order.

20. A new Code of Criminal Procedure was enacted by the Sejm (Parliament) on 6 June 1997. Its Article 250, in its relevant part, reads:

"1. Detention on remand shall be imposed by a court order.

2. In the investigative stage of proceedings, detention on remand shall be imposed, on a prosecutor's request, by a district court in the jurisdiction of which investigations are being conducted. After a bill of indictment is lodged with a court, a decision to impose detention on remand shall be given by a court competent to deal with the merits of the case.

3. The prosecutor, when submitting to a court a request referred to in § 2, shall at the same time order that the suspect be brought before a court."

21. At the relevant time the presence of the parties at court sessions other than hearings was regulated in Articles 87 and 88 of the Code of Criminal Procedure of 1969, which, insofar as relevant, provided:

Article 87:

"The Court pronounces its decisions at a hearing if the law provides for it; and otherwise, at a court session held *in camera*. ..."

Article 88:

"A court session *in camera* may be attended by a prosecutor (...); other parties may attend if the law provides for it."

22. Pursuant to Article 249 of the new Code of Criminal Procedure, before deciding on the application of the preventive measures, the court shall hear the person charged with offence. The lawyer of the detainee should be allowed to attend in the court session, if he or she is present. It is not mandatory to inform the lawyer of the date and time of the court session, unless the suspect so requests and if it will not hinder the proceedings.

23. The court shall inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand, or an appeal against a decision to impose or to prolong detention on remand is to be considered.

b. Position of prosecutors under Polish law

24. At the material time the relations between the organs of the Polish State were set out in interim legislation, i.e. the Constitutional Act of 17 October 1992 (Mała Konstytucja). Article 1 of the Act laid down the principle of the separation of powers in the following terms:

"The legislative power of the State shall be vested in the Sejm and the Senate of the Republic of Poland; the executive power shall be vested in the President of Poland and the Council of Ministers; and judicial power shall be vested in the independent courts."

25. Under Article 56 of the Act, the Council of Ministers (Rada Ministrów) shall be composed of the Prime Minister, Deputy Prime Ministers and Ministers.

26. In pursuance of Article 1 of the Act of 20 June 1985 (Ustawa o sądach powszechnych), the courts are entrusted with administration of justice in the Republic of Poland. The courts are courts of appeal, regional courts and district courts. Under Article 9 of the Law, the Supreme Court exercises supervisory jurisdiction over lower courts.

27. Article 1 of the Act of 20 June 1985 on Prosecuting Authorities (Ustawa o Prokuraturze) which determines general principles concerning the structure, functions and organisation of prosecuting authorities, at the material time read as follows:

"1. The prosecuting authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.

2. The Prosecutor General shall be the highest prosecuting authority; his functions shall be carried out by the Minister of Justice."

Article 2 of the Act reads:

"The prosecuting authorities shall ensure the observance of the rule of law and the prosecution of criminal offences."

28. Under Article 7 of the Act, in carrying out his statutory duties, a prosecutor shall abide by the principles of impartiality and equality of citizens before the law.

29. Pursuant to Article 8 of the Act, a prosecutor is independent in carrying out his or her duties, within the limits set out in this Article. A prosecutor shall abide by the instructions, guidelines and orders of his superiors. However, if an order relates to the substance of any action to be taken in proceedings, a prosecutor may request [his superior] to issue the order concerned with reasons in writing, to alter the order, to relieve him from performing an act prescribed by that order, or to remove him from conducting the case in question. The requests to be removed from a case shall be decided by a hierarchical superior of the prosecutor who issued the order."

30. Chapter III of the Code of Criminal Procedure of 1969, applicable at the material time, entitled "Parties to proceedings, defence counsel, representatives of victims and representatives of society", described a prosecutor as a party to criminal proceedings. According to all the relevant provisions of the Code read together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. In particular, after completing the investigation, he drew up a bill of indictment

and represented the prosecuting authority before the court competent to deal with the case.

31. Under Article 3 of the Code of Criminal Procedure of 1969 "organs conducting criminal proceedings [including a prosecutor] shall examine and take into account evidence in favour of as well as against the accused."

c) Ombudsman

32. Under Article 1 of the Ombudsman Act of 15 July 1987, it is the Ombudsman's task to examine, in his capacity as the guardian of human rights, whether the acts or failure to act on the part of the authorities, organisations and institutions whose functions necessarily impinge on these rights, breached the law or the principles of equity. The Ombudsman may undertake measures provided for by law if he receives information from which it transpires that human rights have been breached. Pursuant to Article 13 of the Act, he is competent to investigate individual complaints. When investigating such complaints he may, *inter alia*, demand that the judicial, prosecuting and administrative authorities submit to him information about a concrete individual case. Under Article 14, once the investigation is completed, the Ombudsman may, if a breach of human rights and liberties has been found, present his opinion to the authority conducting the proceedings. The Ombudsman's actions must be compatible with the principle of the independence of the judiciary. He may also inform a superior authority of his findings and request that appropriate measures provided for by law be taken in respect of the person whose actions amounted to a violation of human rights.

d) Correspondence of persons detained on remand

33. At the relevant time the situation of persons detained on remand was governed by the Code of Execution of Criminal Sentences of 19 April 1969. Under Article 89 of that Code, all correspondence of a person detained on remand was subject to censorship, unless a prosecutor and a court decided otherwise. No provision of the Code provided for any remedy to contest the manner or scope of the censorship of a detainee's correspondence.

34. The rights of persons detained on remand as regards their correspondence were further set out in Rule 33 of the Rules on Detention on Remand, adopted in 1989. They provided that the correspondence of persons detained on remand was subject to censorship by the authority conducting the criminal proceedings, i.e. either a public prosecutor or a court, depending on the stage reached in the proceedings.

35. On 6 July 1997 a new Code of Execution of Criminal Sentences was enacted by parliament. Article 102 of this Code, which entered into force on 1 January 1998, provides that the convicted persons are entitled to

uncensored correspondence with the State authorities and with the Ombudsman. Article 103 of the Code further provides that convicted persons and their lawyers may lodge complaints with the international agencies established under international treaties on protection of human rights, ratified by Poland. Prisoners' correspondence in such cases shall be dispatched with no delay and is not subject to censorship.

36. Pursuant to Article 512 of the new Code, the rights of persons detained on remand shall, in principle, be at least equal with those of persons convicted by a final judgment.

e) Ordinance of the Minister of Justice of 29 March 1991 on the administrative supervision of the courts

37. Article 3 of the Ordinance, which was later repealed, provided that the President of the Regional Court carried out supervision over administrative aspects of the administration of justice by district courts within the jurisdiction of the Regional Court, whereas Article 4 provided that the President of the Court of Appeal carried out supervision over administrative aspects of the administration of justice by regional courts within the jurisdiction of the Court of Appeal.

PROCEEDINGS BEFORE THE COMMISSION

38. The application was declared partly admissible by the Commission on 7 July 1997. In its report of 1 March 1999 (former Article 31 of the Convention) it expressed the unanimous opinion that there had been a violation of Article 5 § 3 of the Convention in that the applicant had been deprived of liberty by a decision of a prosecutor who had not been a judge or other officer authorised by law to exercise judicial power, of Article 5 § 4 of the Convention in that the proceedings concerning review of his detention on remand had not been truly adversarial and of Article 8 of the Convention in that the applicant's correspondence with the Ombudsman had been intercepted and delayed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

39. The applicant alleged a breach of Article 5 § 3 of the Convention the relevant part of which provides:

“ Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Arguments before the Court

0. The applicant submitted that under Polish law as it stood at the material time, the prosecutor had neither been a judge nor an officer authorised to exercise judicial power. According to the Court's case-law, before an officer could be said to exercise judicial power, he or she had to satisfy certain conditions providing safeguards against an arbitrary deprivation of liberty, namely had to be independent of the executive and of the parties. For the assessment of the latter aspect it was crucial that the officer who had decided on detention on remand could not be regarded as impartial if he or she might in the subsequent stages of criminal proceedings act as a prosecuting authority. Under Polish law applicable at the time of the

applicant's detention nothing had prevented the prosecutor who imposed detention to act later on behalf of the prosecuting authorities.

1. The applicant stressed that under the applicable provisions of Polish constitutional law only courts were entitled to exercise judicial power. The prosecutors, being subordinate to Prosecutor General whose function had been carried out by the Minister of Justice, belonged to the executive branch of the government. The prosecutors were obliged to follow the orders of their superiors, who, in turn, were subordinate to the Minister of Justice. In the light of these considerations, the Government's argument that the prosecutors were performing judicial functions could not be regarded as tenable.

2. The applicant further made reference to the legislative developments as regards imposition of detention on remand under Polish law. The relevant provisions of the Criminal Code of 1969 had been amended by virtue of law of 29 June 1995, providing that henceforth detention on remand could only be imposed by a court order. Subsequently, a new Code of Criminal Procedure had been enacted in June 1997, also providing for detention being ordered by a court. The applicant emphasised that the very fact that the provisions governing detention on remand had been so amended indicated that the legislators were aware that the solution applicable in the present case had not been compatible with the requirements of Article 5 of the Convention.

3. The applicant concluded that the imposition of detention by the prosecutor did not satisfy the requirements of Article 5 § 3 of the Convention.

4. The Government first acknowledged that prosecutors in Poland were at the material time, and indeed are at present, subordinate to Prosecutor General - the Minister of Justice, who belonged to the executive branch of government. However, the power to act in criminal proceedings was not entrusted to Prosecutor General, but to ordinary prosecutors acting for district, regional and appellate prosecuting offices.

5. The Government further submitted that under Polish law prosecutors exercised two principal functions: a prosecutorial one and that of a guardian of public interest. They were bound by an obligation to adhere to the principles of impartiality and of equality of individuals before the law.

The prosecutors, before deciding on the detention order, had to question the suspect. Furthermore, they were under an obligation to take into consideration both the circumstances militating for and against detention. They were also empowered to release a detained person if the circumstances no longer justified continued detention. The Government concluded that the prosecutors, who had decided on the applicant's detention on remand, satisfied both procedural and substantive requirements, laid down in the Court's case-law. They relied on the judgments given by the Court in the cases *Schiesser v. Switzerland* (judgment of 4 December 1979, Series A

no. 34, pp. 12-13, §§ 27-31) and *Pauwels v. Belgium* (judgment of 26 May 1988, Series A no. 135, p. 18, § 38).

6. The Government stated that in the present case the applicant had first been remanded in custody by the decision of the Rybnik District Prosecutor of 2 September 1994. Only ten days afterwards the Katowice Regional Court, examining the applicant's appeal against the detention order, had had an opportunity to review the circumstances militating for and against his detention. In its decision of 12 September 1994 the Katowice Regional Court had upheld the detention order and accepted the grounds relied on by the prosecutor to justify the applicant's detention. The applicant had later been again remanded in custody on 21 April 1995 by a decision of the Racibórz District Prosecutor. He had lodged an appeal against the detention order and only six days later the Racibórz District Court had dismissed it, having considered the arguments advanced by the prosecutor in the detention order and having found that the applicant's new detention had been lawful and justified.

7. The Government concluded that the applicant's right to be brought before a judge or other officer authorised to exercise judicial power had therefore been respected in the case.

B. The Court's assessment

8. The Court recalls that the role of the officer referred to in Article 5 § 3 is to review the circumstances militating for and against detention and to decide, by reference to legal criteria, whether there are reasons to justify detention and to order release if there are no such reasons. Before an "officer" can be said to exercise "judicial power" within the meaning of this provision, he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty (see the *Schiesser v. Switzerland* judgment of 4 December 1979, Series A no. 34, pp. 13-14, § 31).

9. Thus, the "officer" must be independent of the executive and of the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the "officer" may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality are capable of appearing open to doubt (see the *Huber v. Switzerland* judgment of 23 October 1990, Series A no. 188, p. 18, § 43, and the *Brincat v. Italy* judgment of 26 November 1992, Series A no. 249-A, p. 12, § 21). The "officer" must hear the individual brought before him in person and review whether or not the detention is justified. If it is not justified, the "officer" must have the power to make a binding order for the detainee's release (see the above-mentioned *Schiesser* judgment, pp. 13-14, § 31, and the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 75-76, § 199).

10. The Court further reiterates that the judicial control of the detention must be automatic (see the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 24, § 51). It cannot be made to depend on a previous application by the detained person. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court (see the *De Jong, Baljet and Van den Brink* judgment cited above, pp. 25-26, § 57). It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (see, *mutatis mutandis*, the *Kurt v. Turkey* judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 123; *Aquilina v. Malta* [GC], no. 25642/94, § 49, to be published in the Court's official *Reports*).

11. The Court first observes that Polish constitutional law provides for the separation of legislative, executive and judicial powers. In particular, pursuant to the provisions of the Act of 20 June 1986, governing the administration of justice, the latter power is entrusted solely to the independent courts.

12. The provisions relating to the structure, functions and organisation of the prosecuting authorities contained in the Act on Prosecuting Authorities (see § 27 above) provide that in criminal proceedings the tasks of prosecution are carried out by prosecutors. In this respect, the Court notes the Government's submission that prosecutors in Poland were at the material time, and, indeed, still are, subordinate to the Prosecutor General, who at the same time carries out the function of the Minister of Justice. It is therefore indisputable that the prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch of the Government.

13. In the Court's view, the mere fact, relied on by the Government, that under applicable laws the prosecutors, in addition to exercising a prosecutorial role also act as guardian of the public interest, cannot be regarded as conferring on them a judicial status. It notes that the prosecutors perform investigative and prosecuting functions and, therefore, their position in the criminal proceedings as provided for by law as it stood at the material time, in particular by the provisions of Chapter III of the Code of Criminal Procedure of 1969, must be seen as that of a party to these proceedings.

14. In addition, the prosecutors, who remanded the applicant in custody, questioned him before making the detention order and considered whether in the circumstances of the case his detention would be justified. However, in the light of the above considerations concerning the position of prosecutors as laid down in constitutional law, this does not suffice for a

finding that the prosecutors offered such guarantees of independence as could be regarded as being in compliance with the requirements of Article 5 § 3 of the Convention.

15. The Court further notes that the detention orders given by the prosecutors on 2 September 1994 and on 21 April 1995 were subsequently subject to judicial review, following the applicant's appeals, carried out after ten days and six days, respectively. However, this review was not automatic as it depended on the application lodged with the court by the applicant. Consequently, the fact that judicial review of his detention was open to him does not remedy the shortcoming that the detention orders were made by the prosecutors.

16. Finally, it is noted that it is not in dispute that Polish law as applicable at the relevant time did not offer any safeguards against the risk that the same prosecutor who decided on the applicant's detention on remand might later take part in the prosecution.

17. The Court concludes therefore that there has been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

18. The applicant also asserted that the respondent State had breached Article 5 § 4 of the Convention which reads:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Arguments before the Court

19. The applicant submitted that it was not in dispute that in the present case he had not been brought before a court in any of the proceedings concerning review of his detention on remand. According to the principle relied on by the Court in the Assenov case (the Assenov v. Bulgaria judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3302, § 162), the accused whose detention falls within the ambit of Article 5 § 1 c) of the Convention should be entitled to have the procedural and substantive aspects of his detention examined at a hearing in his presence.

20. The applicant further submitted that under the legal provisions applicable at the material time not only he had not been entitled to attend the court session held in the proceedings concerning review of his detention, but he had not been able to have the prosecutor's arguments submitted to

the court in support of his detention communicated to him. Consequently, the applicable provisions had not given him any opportunity to comment on the prosecutor's position taken in this respect.

21. The applicant further addressed the Government's argument that the prosecutors' decisions in respect of the applicant's detention should be regarded as correct since they had subsequently been accepted by the courts. The applicant stressed that this argument could not be considered valid as, had the applicant or his representative been given an opportunity to attend the court session and present to the court arguments in reply to those advanced by the prosecuting authorities, it could not be ruled out that the courts, having been acquainted with the arguments of both parties, could have been prompted to rule differently. The courts effective possibility of having thoroughly examined whether the applicant's detention was justified having been thus limited, the guarantees of the *habeas corpus* procedure had not been respected in the case under consideration.

22. The Government argued that the courts examining the applicant's appeals against detention orders and his requests for release had had full jurisdiction to consider the compliance of his detention with the procedural requirements set out in the applicable provisions of the Code of Criminal Procedure, and also to review the reasonableness of the suspicion grounding his detention.

23. The Government acknowledged that the applicant had not been entitled to participate in the sessions of the courts examining the lawfulness of his detention. It was true that the prosecutor had been entitled to attend such sessions, but his or her presence had not been mandatory. In respect of the proceedings concerning review of the applicant's detention held before the Racibórz District Court on 27 April 1995, the Government submitted that neither the applicant nor the prosecutor had been present. Consequently, it could not be alleged that the principle of equality of arms had not been respected in these proceedings.

24. The Government further argued that even in the absence of the applicant and of his lawyer at the court sessions held in the proceedings concerning judicial review of his detention, the courts had been aware of the arguments submitted by the applicant in writing. It had therefore been open to the courts to make a thorough appraisal whether his detention had been lawful and justified. The Katowice Regional Court twice examined the two appeals lodged by the applicant against, first, the detention order of 2 September 1994, and, secondly, against the decision of the Rybnik District Prosecutor of 21 September 1994, prolonging the detention. On both occasions the court had taken into consideration all the arguments which the applicant had submitted to it in writing.

25. The Government concluded that the applicant, in the proceedings concerning review of his detention on remand, had benefited from truly adversarial proceedings, as required by Article 5 § 4 of the Convention.

B. The Court's assessment

26. The Court recalls that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 154-B, p. 34, § 65). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation (see the *Megyeri v. Germany* judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see the above-mentioned *Schiesser* judgment, p. 13, §§ 30–31, the *Sanchez-Reisse v. Switzerland* judgment of 21 October 1986, Series A no. 107, p. 19, § 51, and the *Kampanis v. Greece* judgment of 13 July 1995, Series A no. 318-B, p. 45, § 47). In particular, in the proceedings in which an appeal against detention order is being examined, “equality of arms” between the parties, the prosecutor and the detained person must be ensured (*Nikolova v. Bulgaria* [G.C.], no. 31195/96, 25.03.1999, § 59).

27. The Court observes that in the case under consideration the orders of the prosecutor imposing detention on remand were twice reviewed by the courts, first in the proceedings held before the Katowice Regional Court on 12 September 1994, and, secondly, before the Racibórz District Court on 27 April 1995. The Court notes that it is not contested that the law, as it stood at that time, did not entitle either the applicant himself or his lawyer to attend the court session. Moreover, the applicable provisions did not require that the prosecutor’s submissions in support of the applicant’s detention be communicated either to the applicant or to his lawyer. Consequently, the applicant did not have any opportunity to comment on those arguments in order to contest the reasons invoked by the prosecuting authorities to justify his detention. The Court finally notes that under applicable provisions of the law on criminal procedure it was open for the prosecutor to be present at any of court sessions in which the court examined the lawfulness of the applicant’s detention and that on one occasion the prosecutor was present.

28. In conclusion, in the light of the above considerations, the Court finds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that the fact that his correspondence with the Ombudsman was intercepted and delayed amounted to a violation of Article 8 of the Convention, which reads:

“1. Everyone has the right to respect for his ... correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments before the Court

30. The applicant submitted that he had sent two identical letters, alleging ill-treatment by the prison guards, one to the prosecutor for the purpose that his complaint be investigated, and a copy of this letter to the Ombudsman. The letter addressed to the Ombudsman had been marked with a notice “for information”. This letter had been intercepted by the prison authorities, forwarded to the prosecutor’s office, opened by the prosecutor and eventually served on the Ombudsman with a delay of almost two months. By sending the letter to the Ombudsman the applicant sought to ensure that his complaint against the prison guards be appropriately processed by the prosecutor. This letter should clearly be regarded as correspondence, which should have enjoyed protection afforded by Article 8 of the Convention.

31. The applicant argued that it could not be reasonably supposed that the letter had contained any material which would be harmful to prison security, or the safety of others, or otherwise of criminal nature, given that it had been addressed to the Ombudsman whose statutory function was to act as a guardian of law and human rights. In view thereof, the correspondence with him should be considered as privileged. The applicant referred in this connection to the Court’s established case-law, in which emphasis had been laid on the importance of respect for the confidentiality of correspondence of prisoners with the European Commission of Human Rights since it could concern allegations against the prison authorities or prison officials (the *Campbell v. the United Kingdom* judgment of 25 March 1992, Series A no. 233, s. 22, § 62). Violation of this confidentiality could expose detained persons to a risk of repression. The same principle should be observed as regards correspondence with national bodies entrusted with the supervision of observance of human rights by public authorities.

32. The applicant maintained that the legal provisions concerning the handling of correspondence of detained persons applicable at the material time in Poland had been flawed with serious deficiencies. The applicant referred in this respect to the judgments of the Courts in which violation of Article 8 of the Convention had been found on account of too much latitude given to the national authorities as regards the monitoring of prisoners' correspondence. It was further stressed that the same criticism could be levelled against the relevant provisions of Polish law.

33. The applicant emphasised that, pursuant to Article 89 of the Code of Execution of Criminal Sentences as applicable at the material time, prisoners' correspondence had been subject to automatic censorship. The act of control of correspondence had not been a decision within the meaning of administrative law and therefore it could not be effectively challenged before any authority. In particular, no appeal to the Supreme Administrative Court lay against it. Moreover, the law failed to specify the manner in which censorship could be carried out, its scope and time-limits to be respected by the domestic authorities.

34. The applicant further stated that in 1997 the Code of Execution of Criminal Sentences of 1969 was repealed and replaced by a new Code. Under the new Code, correspondence with the Ombudsman of persons convicted by a final judgment is exempt from any censorship. This amendment indicated, in the applicant's opinion, that the legislator, when bringing the provisions governing the correspondence of convicted prisoners in line with the Convention requirements, must have been aware of the shortcomings of the legislation, which had been applied in the present case.

35. The Government recalled that the control over correspondence of detained persons was not in itself incompatible with the Convention (the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, Series A no. 61, p. 38, § 98). They further stressed that the applicant's letter to the Ombudsman had been intended only for the latter's information. Thus, it had not been the applicant's intention to request the Ombudsman's intervention, but only to inform him about the criminal complaint, which the applicant had lodged with the prosecutor.

36. The Government further stated that Polish law applicable at the material time had provided for censorship by the authority conducting criminal proceedings, i.e. either the public prosecutor or a court, depending on the stage of the proceedings. The rights of detained persons as regards their correspondence had been set out in the Code of Execution of Sentences and in the Rules on Detention on Remand. Therefore the interference complained of should be regarded as lawful. It had also been open to a detained person to contest the scope and manner of monitoring his or her correspondence by way of lodging a complaint with the president of the court conducting the criminal proceedings against the detained person,

under the provisions of Articles 3 and 4 of the Ordinance of the Minister of Justice of 29 March 1991.

37. The Government concluded that the interference with the applicant's correspondence had been in accordance with the law as required by Article 8 of the Convention.

B. Assessment by the Court

38. The Court considers that there was "interference by a public authority" with the exercise of the applicant's right to respect for his correspondence, which is guaranteed by paragraph 1 of Article 8. Such an interference will contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is "necessary in a democratic society" in order to achieve them (see the following judgments: *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, p. 32, § 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, § 34; *Calogero Diana v. Italy*, 15 November 1996, *Reports* 1996-V, p. 1775, § 28; *Petra v. Romania*, 23 September 1998, *Reports* 1998-VII, p. 2853, § 36).

39. The expression "in accordance with the law" does not only necessitate compliance with domestic law, but also relates to the quality of that law (the *Halford v. the United Kingdom* judgment of 25 June 1997, *Reports* 1997-III, p. 1017, § 49; *Baranowski v. Poland* judgment of 28 March 2000, to be published in the Court's official *Reports*, § 52, *mutatis mutandis*). The Court recalls that domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (the *Domenichini v. Italy* judgment of 15 November 1996, *Reports* 1996-V, p. 1800, § 33).

40. In their submissions, the Government referred to the provisions of the Ordinance of the Minister of Justice of 29 March 1991 and contended that they should be regarded as a legal basis for a remedy against the act of censorship of his correspondence. However, the Court notes that, even assuming that these provisions might be so construed as to mean that against a particular measure of control of correspondence, a hierarchical complaint could be lodged with a president of a superior court, the applicant could not possibly have had recourse to this procedure, given that the criminal proceedings against him had at the material time still been in the investigation phase. Hence, as the act concerned in the present case had been carried out by the prosecutor, no appeal against it could have possibly been made to a president of any court. In any event, the Government failed to adduce any arguments based on domestic practice capable of

demonstrating that this provision served as a legal basis for a complaint against censorship of correspondence of persons detained on remand.

41. The Court observes that Polish law, as it stood at the material time (see §§ 34 and 35 above), allowed for automatic censorship of prisoners' correspondence by the authorities conducting criminal proceedings. Thus, the applicable provisions did not draw any distinction between the different categories of persons with whom the prisoners could correspond. Consequently, also the correspondence with the Ombudsman was subject to censorship. Moreover, the relevant provisions had not laid down any principles governing the exercise of this censorship. In particular, they failed to specify the manner and the time-frame within which it should be effected. As the censorship was automatic, the authorities were not obliged to give a reasoned decision specifying grounds on which it had been effected.

42. In the light of the foregoing considerations, the Court concludes that Polish law as it stood at the material time, did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities in respect of control of prisoners' correspondence. It follows that the interference complained of was not "in accordance with the law".

D. Purpose and necessity of the interference

43. Having regard to the foregoing conclusion, the Court does not consider it necessary in the instant case to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with.

E. Conclusion

44. Consequently, the Court concludes that there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

46. The applicant sought award of USD 90,000 in compensation for both non-pecuniary and pecuniary damage he had suffered.

47. The Government requested the Court to rule that a finding of a violation constituted sufficient and just satisfaction. In the alternative, they asked the Court to assess the amount of just satisfaction on the basis of its case-law in similar cases, taking into account all relevant circumstances of the applicant's case, and having regard to national economic circumstances, in particular such as purchasing power of national currency and the current minimum gross salary in Poland.

48. As regards the claim for the alleged damage suffered as a result of violation of Article 5 §§ 3 and 4 of the Convention, the Court recalls that in certain cases which concerned violations of Article 5 §§ 3 and 4 it has made modest awards in respect of non-pecuniary damage (see the *Van Droogenbroeck v. Belgium* judgment of 25 April 1983 (*Article 50*), Series A no. 63, p. 7, § 13, and the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment cited above, p. 29, § 65). However, in more recent cases, it has declined to make any such award (see the *Pauwels v. Belgium* judgment cited above, p. 20, § 46; the *Brogan and Others v. the United Kingdom* judgment cited above (*Article 50*), pp. 44-45, § 9; the *Huber v. Switzerland* judgment cited above, p. 19, § 46; the *Toth v. Austria* judgment of 12 December 1991, Series A no. 224, p. 24, § 91; the *Kampanis v. Greece* judgment cited above, p. 49, § 66; the *Hood v. the United Kingdom* judgment of 18 February 1999, to be published in the Court's official reports, §§ 84-87; and the *Nikolova v. Bulgaria* judgment of 25 March 1999, also to be published in the Court's official *Reports*, § 76). In some of these judgments the Court stated that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5 § 3 and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered.

49. In the present case, the Court cannot speculate as to whether the applicant would have been detained on remand had the procedural guarantees of Article 5 §§ 3 and 4 been respected in his case. Consequently, the Court considers that the non-pecuniary damage is adequately compensated by the finding of a violation of these provisions.

50. The Court further considers that the applicant sustained non-pecuniary damage on account of the delayed dispatch of his correspondence with the Ombudsman, and awards him a sum of PLN 2,000.

B. Costs and expenses

51. The applicant, who received legal aid from the Council of Europe in connection with his legal representation in the proceedings before the Commission and the Court, sought reimbursement of costs and expenses in a sum in Polish zlotys equivalent to USD 2400.

52. The Government requested the Court to decide on award of legal costs and expenses insofar as they had been actually and necessarily incurred and reasonable as to quantum. They relied in this respect on the *Zimmerman and Steiner v. Switzerland* judgment of 13 July 1983 (Series A no. 66, p. 35, § 36).

53. Applying the criteria laid down in its case-law (see, for instance, the *Baranowski v Poland* judgment of 28 March 2000, § 85) the Court considers that the applicant's claim is reasonable. He should thus be granted a sum of PLN 10,800 for costs and expenses together with any value-added tax that may be chargeable, less 9989 French francs already paid by way of legal aid in respect of fees and travel and subsistence expenses.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in Poland at the date of adoption of the present judgment is 21 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;
2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
4. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
 - (i) by way of compensation for non-pecuniary damage, 2,000 (two thousand) Polish zlotys;

- (i) for costs and expenses, 10,800 (ten thousand eight hundred) Polish zlotys, together with any value-added tax that may be chargeable, less 9989 (nine thousand nine hundred eighty nine) French francs already paid by way of legal aid, to be converted into Polish zlotys at the exchange rate applicable at the date of delivery of this judgment;
 - (b) that simple interest at an annual rate of 21 % shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
5. *Dismisses*, by 6 votes to 1, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle
Registrar

Elisabeth Palm
President